FILED
AUG 6 2007
OFFICE OF THE
SUPREME

Nos. 06-1454, 06-1457, 06-1462 and 06-1468

IN THE SUPREME COURT OF THE UNITED STATES

SEMPRA GENERATION, *ET AL.*, *PETITIONERS*,
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *ET AL.*,
RESPONDENTS.

MORGAN STANLEY CAPITAL GROUP INC., *ET AL.*, *PETITIONERS*,
v.
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY WASHINGTON,
ET AL., *RESPONDENTS*.

CALPINE ENERGY SERVICES, L.P., *ET AL.*, *PETITIONERS*,
v.
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY WASHINGTON,
ET AL., *RESPONDENTS*.

DYNEGY POWER MARKETING, INC., *ET AL.*, *PETITIONERS*,
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *ET AL.*,
RESPONDENTS.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, NEVADA POWER COMPANY, SIERRA PACIFIC POWER COMPANY, GOLDEN STATE WATER COMPANY, AND OFFICE OF THE NEVADA ATTORNEY GENERAL, BUREAU OF CONSUMER PROTECTION

[Counsel listed on inside front cover]

RICHARD TARANTO
FARR & TARANTO
1220 19th Street N.W., Ste. 800
Washington, DC 20036

ROGER BERLINER
BERLINER LAW PLLC
700 12th Street, N.W., Ste. 700
Washington, DC 20005

Counsel for Nevada Power Company and Sierra Pacific Power Company

PAUL J. KALETA
NEVADA POWER COMPANY
6226 West Sahara Avenue
Las Vegas, NV 89151

JOHN E. MCCAFFREY
DAVID D'ALESSANDRO
KELLY A. DALY
STINSON MORRISON HECKER LLP
1150 18th Street, N.W., Ste. 800
Washington, DC 20036-3816

Counsel for the Office of the Nevada Attorney General Bureau of Consumer Protection

ERIC P. WITKOSKI
OFFICE OF THE NEVADA ATTORNEY GENERAL
BUREAU OF CONSUMER PROTECTION
555 E. Washington Ave. #3900
Las Vegas, NV 89101

CHRISTOPHER J. WRIGHT*
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

Counsel for Snohomish County PUD No. 1

* *COUNSEL OF RECORD*

ERIC CHRISTENSEN
SNOHOMISH COUNTY PUD NO. 1
2320 California Street
Everett, WA 98201

RANDOLPH LEE ELLIOTT
MILTON J. GROSSMAN
JEFFREY K. JANICKE
MILLER, BALIS & O'NEIL, P.C.
1140 19th St., N.W., Ste. 700
Washington, DC 20036

Counsel for Golden State Water Company

PARTIES TO THE PROCEEDING

In the litigation below, respondent Public Utility District No. 1 of Snohomish County, Washington ("Snohomish"), was a petitioner in *Public Utility District No. 1 of Snohomish County v. FERC* in the Ninth Circuit and a complainant in the underlying administrative proceedings before FERC. Snohomish was an intervenor in *Public Utilities Comm'n v. FERC* in the Ninth Circuit and in the underlying administrative proceedings before FERC.

Respondent Golden State Water Company was known by its former corporate name, Southern California Water Company. It was a petitioner in *Public Utility District No. 1 of Snohomish County v. FERC* in the Ninth Circuit, and a complainant in the underlying FERC proceedings. Golden State Water Company was an intervenor in *Public Utilities Comm'n v. FERC*.

Respondents Nevada Power Company and Sierra Pacific Power Company were petitioners in *Public Utility District No. 1 of Snohomish County Washington v. FERC* in the Ninth Circuit, and complainants in the underlying FERC proceedings. Respondents Nevada Power Company and Sierra Pacific Power Company were intervenors in *Public Utilities Commission of California v. FERC* in the Ninth Circuit and in the underlying FERC proceedings.

Respondent Office of the Nevada Attorney General, Bureau of Consumer Protection ("Nevada BCP") was an intervenor before FERC and a petitioner in *Public Utility District No. 1 of Snohomish County v. FERC* in the Ninth Circuit.

RULE 29.6 STATEMENT

Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") is a municipal corporation and a subdivision of the State of Washington formed under Title 54 of the Revised Code of Washington by a vote of the people of Snohomish County, Washington, in 1936. Snohomish issues no stock and is prohibited by the Constitution of the State of Washington from holding stock in any private corporation.

Golden State Water Company's parent company is American States Water Company. American States Water Company has no parent company, and no publicly held company owns more than 10% of its stock.

Nevada Power Company has 100% of its stock owned by Sierra Pacific Resources, a publicly held corporation.

Sierra Pacific Power Company has 100% of its stock owned by Sierra Pacific Resources, a publicly held corporation.

The Nevada Bureau of Consumer Protection operates within the Office of the Nevada Attorney General pursuant to Nev. Rev. Stat. § 228.310, and may represent the interests of Nevada utility consumers before FERC and the federal courts pursuant to Nev. Rev. Stat. § 228.360.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES iv
STATEMENT 1
ARGUMENT 11
I. THE DECISIONS BELOW ARE CONSISTENT WITH THE STATUTE AND THIS COURT'S DECISIONS 11
A. The Statute 11
B. *Mobile* and *Sierra* 13
C. Other Decisions Of This Court 16
II. THE NINTH CIRCUIT'S DECISIONS DO NOT CONFLICT WITH OTHER CIRCUITS' LAW 18
A. The D.C. Circuit 19
B. The First Circuit 23
III. The Decisions Below Give FERC Ample Authority To Rely On Market-Based Rates 26
CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Arkansas Louisiana Gas Co. v. Hall,
453 U.S. 571 (1981) 16, 17

Atlantic City Elec. Co. v. FERC,
295 F.3d 1 (D.C. Cir. 2002) 21

Atlantic Refining Co. v. Pub. Serv. Comm'n of New York, 360 U.S. 378 (1959) 17

Borough of Lansdale v. FPC,
494 F.2d 1104 (D.C. Cir. 1974) 23

Boston Edison Co. v. FERC,
856 F.2d 361 (1st Cir. 1988) 24

Boston Edison Co. v. FERC,
233 F.3d 60 (1st Cir. 2000) 18, 19, 23, 24

California ex rel. Lockyer v. FERC,
383 F.3d 1006 (9th Cir. 2004) 3, 4

Compania de Gas de Nuevo Laredo v. FERC,
606 F.2d 1024 (D.C. Cir. 1979) 23

Elizabethtown Gas Co. v. FERC,
10 F.3d 866 (D.C. Cir. 1993) 19

Farmers Union Central Exchange, Inc. v. FERC, 734 F.2d 1486 (D.C. Cir. 1984) 20

FPC v. Hope Natural Gas Co.,
320 U.S. 591 (1944) 12, 17

FPC v. Louisiana Power & Light Co.,
406 U.S. 621 (1972) 18

FPC v. Sierra Pacific Power Co.,
350 U.S. 348 (1956) ..... *passim*

FPC v. Texaco Inc., 417 U.S. 380 (1974) 3, 18

Gulf States Utils. Co. v. FPC,
411 U.S. 747 (1973) 17

Interstate Natural Gas Assoc. v. FERC,
285 F.3d 18 (D.C. Cir. 2002) 19

Louisiana Energy & Power Auth. v. FERC,
141 F.3d 364 (D.C. Cir. 1998) 19, 20

Maine Pub. Serv. Comm'n v. FERC,
454 F.3d 278 (D.C. Cir. 2006) 20

NAACP v. FPC, 425 U.S. 662 (1976) 17

Natural Gas Pipeline Co. v. Harrington,
246 F.2d 915 (5th Cir. 1957) 23

New York v. FERC, 535 U.S. 1 (2002) 19

Northeast Utilities Service Co. v. FERC,
993 F.2d 937 (1st Cir. 1993) 24, 25, 26

Northeast Utilities Service Co. v. FERC,
55 F.3d 686 (1st Cir. 1995) 24, 26

Pennsylvania Water & Power Co. v. FPC,
343 U.S. 414 (1952) 1, 16

PEPCO v. FERC,
210 F.3d 403 (D.C. Cir. 2000) 20, 21, 22

Permian Basin Area Rate Cases,
390 U.S. 747 (1968) 2, 17, 18

Pub. Serv. Comm'n of New York v. FPC,
543 F.2d 757 (D.C. Cir. 1974) 22

Sam Rayburn Dam Elec. Coop. v. FPC,
515 F.2d 998 (D.C. Cir. 1975) 23

Sunray Mid-Continent Oil Co. V. FPC,
364 U.S. 137 (1960) 17

Tejas Power Corp. v. FERC,
908 F.2d 998 (D.C. Cir. 1990) 3

Texaco Inc. v. FERC,
148 F.3d 1091 (D.C. Cir. 1998) 22

Town of Norwood v. FERC,
587 F.2d 1306 (D.C. Cir. 1978) 21

Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) 19, 21

United Distributors Cos. v. FERC,
88 F.3d 1105 (D.C. Cir. 1996) 21

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) ..... *passim*

STATUTES

16 U.S.C. § 824(a) 1

16 U.S.C. § 824d(a) 1, 12

16 U.S.C. § 824e(a) 1, 2

ADMINISTRATIVE MATERIALS

AEP Power Mktg., Inc.,
97 FERC ¶ 61,219 (2001) 5

Avista Corp.,
96 FERC ¶ 61,058 (2001) 5

Californians for Renewable Energy, Inc. v. California PUC,
119 FERC ¶ 61,058 (2007) 25, 27, 28, 29

Enron Power Mktg., Inc.,
103 FERC ¶ 61,343 (2003) 4

GWF Energy, LLC,
97 FERC ¶ 61,297 (2001) 15

Order No. 697, *Market-Based Rates*, 72 Fed. Reg. 39,904 (July 20, 2007) 29

Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997) 21

Northeast Utils. Serv. Co.,
66 FERC ¶ 61,332 (1994) 24

San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.,
93 FERC ¶ 61,121 (2000) 4, 5, 6

San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.,
93 FERC ¶ 61,294 (2000) 5

San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.,
95 FERC ¶ 61,418 (2001) 4, 5, 6

San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.,
105 FERC ¶ 61,066 (2003) 7

Statement of Chairman Kelliher, *available at* http://www.ferc.gov/news/statements-speeches/kelliher/2007/06-21-07-kelliher-E-1.pdf 29

Wholesale Competition, 72 Fed. Reg. 36,275 (July 2, 2007) 30

OTHER AUTHORITIES

Steven Stoft, Power System Economics (2002) 4

Blank Page

STATEMENT

In these cases, the Ninth Circuit applied the Federal Power Act ("FPA") and this Court's decisions construing it to review orders of the Federal Energy Regulatory Commission ("FERC") addressing the lawfulness of wholesale electricity rates in contracts signed during the western energy crisis of 2000-2001. The court held that FERC may not presume that a "market-based" contract rate is lawful under the statute where the rate has never been subject to FERC's review and FERC has not ensured that the contract was entered into in a properly functioning market. The court further held that, in cases where this presumption applies, the factors relevant to determining whether a contract rate is too low do not exhaust the factors relevant to determining whether a contract rate is too high. The Ninth Circuit remanded the case and left substantial discretion to FERC, which, accordingly, has not petitioned for review.

1. Background

Congress enacted the FPA in 1935 because it concluded that federal regulation of the interstate sale and transmission of electricity "is necessary in the public interest." 16 U.S.C. § 824(a). The FPA's primary purpose is "to protect power consumers against excessive prices." *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952). To that end, Section 205 requires that "[a]ll rates and charges made, demanded, or received" by any regulated entity "for or in connection with the . . . sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable" and declares that any rate or charge not meeting the just and reasonable standard is "unlawful." 16 U.S.C. § 824d(a). Section 206, in turn, provides that whenever FERC finds that "any rate, charge, . . . or contract affecting such rate [or] charge"

is "unjust, unreasonable, unduly discriminatory or preferential," it must "determine the just and reasonable rate, charge . . . or contract." *Id.* § 824e(a).

In 1956, this Court held, in cases construing the FPA and the "substantially identical" provisions of the Natural Gas Act ("NGA"), that a regulated utility may not employ the rate filing provisions of those acts unilaterally to increase the rates in a contract – in each case, previously filed with the Commission and formed under circumstances that were unchallenged – "solely because [the contract] yields less than a fair return." *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 343-44 (1956). The Court emphasized that its holding "in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest," but distinguished the seller's "private interest" in increasing a contract rate from the interests of "those who represent the public interest or those who might be discriminated against." *Id.* at 344-45. The "*Mobile-Sierra* doctrine" thus recognizes that, while the statutes are "premised upon a continuing system of private contracting, . . . the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

For most of the FPA's history, FERC (and its predecessor, the Federal Power Commission ("FPC")) operated under a regulatory regime in which sellers filed tariffs with FERC specifying the rates they intended to charge, subject to being disapproved by the agency if they were not "just and reasonable" based on the cost to the seller of providing the service plus a fair

return on invested capital. In the 1990s, based on its view that competition among wholesalers could obviate the need for traditional cost-based regulation, FERC began to move to a new "market-based" regulatory regime with relaxed rate-filing requirements. If a seller can establish that it lacks market power or has mitigated its ability to exercise market power, the Commission will give it authority to negotiate rates in the marketplace, with those rates automatically taking effect, and sellers' transactions reported only quarterly to the Commission. *See California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1009 (9th Cir. 2004), *cert denied*, 127 S. Ct. 2972 (2007). Under this regime, particular *rates* are no longer even filed, let alone reviewed, before they take effect. Instead, the Commission relies generally on the presumption that "[i]n a *competitive* market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of [a] voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment." *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990). (emphasis added).

This Court has recognized that FERC's authority to rely on market-based contract rates is necessarily limited by the statutory command that rates be just and reasonable. In 1970, the FPC relieved small natural gas producers from most of the NGA's filing requirements and assured those producers that their contract rates would not be subject to change, reasoning that competition from larger producers would keep the rates charged by smaller producers in check. *FPC v. Texaco Inc.*, 417 U.S. 380, 384 (1974). This Court held "that the Commission lacks the authority to place exclusive reliance on market prices." *Id.* at 400. The Court agreed that "the Commission

may have great discretion as to how to insure just and reasonable rates," but held that the Commission must insure that "the rates paid by pipelines, and ultimately borne by the consumer, are just and reasonable." *Id.* at 394, 401. Thus, *Texaco* makes clear that FERC's reliance on market forces must co-exist with regulatory oversight under the FPA.

2. The Western Energy Crisis

The western energy crisis of 2000-2001 involved an unprecedented combination of market failures, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121, p. 61,349-50 (2000), market manipulation, *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343, p. 62,301 (2003), and "abdicati[on]" by FERC of its regulatory responsibility, *Lockyer*, 383 F.3d at 1015. Wholesale electricity expenditures in California more than quadrupled (from $2.04 billion to $8.98 billion) between summer 1999 and summer 2000, with 59% of the increase attributable to market power, according to a study by the University of California. ER 1045-46.[1]

The market problems first manifested themselves in the organized "spot markets" for electricity in California, although the adverse effects of market dysfunction quickly became evident in the forward bilateral contract markets as well.[2] On November 1, 2000, FERC concluded that the California market

---

[1] The "ER" references in this brief are to the Excerpts of Record filed in the Ninth Circuit.

[2] Spot market sales are for 24 hours or less and are entered into the day of or the day prior to delivery. *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶ 61,418, p. 62,545 n.3 (2001). The long-term bilateral (or "forward") markets are informal, decentralized markets in which energy is sold in advance using forward contracts – agreements for the future delivery of energy at an agreed-upon price (the "forward price"). *See* Steven Stoft, Power System Economics 90, 203-04, 446, (2002).

structure and rules were "seriously flawed" and "provide the opportunity for sellers to exercise market power when supply is tight and can result in unjust and unreasonable rates." *San Diego*, 93 FERC at 61,349-50. At the same time, FERC concluded that "higher spot market prices in turn affect the prices in forward markets." *Id.* at 61,367. By December 15, 2000, FERC had "no assurance that rates will not be excessive relative to the benchmarks of producer costs or competitive market prices," and concluded that "unjust and unreasonable rates . . . could continue to be charged unless remedies are implemented." *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,294, p. 61,999 (2000).

California is part of a single integrated electricity market in the West, *e.g.*, *Avista Corp.*, 96 FERC ¶ 61,058, p. 61,179 (2001), *order clarified*, *Avista Corp.*, 96 FERC ¶ 61,265 (2001), and therefore the market dysfunctions in California "resulted in a dysfunctional marketplace both in California and the remainder of the West." *San Diego*, 95 FERC ¶ at 62,556. For example, in the Pacific Northwest, where wholesale prices historically averaged approximately $24 per megawatt-hour ("MWh"), short-term prices increased to $200 to $500 per MWh for extended periods. Pet. App. 25a.[3]

Because "maintaining an accurately priced spot market is the single most important element for disciplining longer term transactions," *AEP Power Mktg., Inc.*, 97 FERC ¶ 61,219, at p. 61,972 (2001), "[t]hese higher spot market prices in turn affect[ed] the prices in forward markets," *San Diego*, 93 FERC at

---

[3] The "Pet. App." references in this brief are to the appendix filed by Calpine Energy Services, L.P., in No. 06-1462.

61,367 (2000). Thus, long-term rates also reached unprecedented levels across the West. ER 1040-41.

In a series of orders, each one implementing more comprehensive remedies than the one before it, FERC attempted to address the crisis. Significantly, FERC's initial "fundamental remedy" in its December 15, 2000, order was to have California's largest utilities sign long-term purchase contracts instead of purchasing in the spot markets. *San Diego*, 93 FERC at 61,992-93. It terminated the FERC-regulated tariff for California's main organized spot market and "strongly urge[d]" utilities "to move their load to long-term contracts of two years or more." *Id.* at 61,993.

Recognizing that abruptly moving much of California's demand to the forward market might drive up long-term contract prices, FERC promised that it would "be vigilant in monitoring the possible exercise of market power." *Id.* at 61,994. Because of "concerns about potentially unjust and unreasonable rates in the long-term markets," FERC pledged to "monitor prices in those markets" and "adopt[ed] a benchmark that we will use as a reference point in addressing any complaints regarding the pricing of long-term contracts negotiated over the next year, after which time the sudden increase in forward demand will have subsided." *Id.* FERC set this benchmark price at $74 per megawatt-hour (MWh) for "five-year contracts for supply around-the-clock." *Id.* at 61,994-95.

Neither FERC's order moving purchases from spot to forward markets nor its other incremental remedial steps ameliorated the crisis. Finally, in June 2001, FERC implemented price mitigation around the clock in the spot market throughout the western United States. *See San Diego*, 95 FERC ¶ 61,418. After this step, both spot and forward prices quickly dropped back to ordinary levels. ER 878-79.

In the midst of the market "meltdown," *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 105 FERC ¶ 61,066, p. 61,371 (2003), respondents Public Utility District No. 1 of Snohomish County, Washington ("Snohomish"), Nevada Power Company ("Nevada"), Sierra Pacific Power Company ("Sierra") and Golden State Water Company ("GSWC") (collectively, "Western Utilities") faced the task of acquiring power to serve the needs of their retail utility customers. Reflecting the severely dysfunctional state of the market at the time, the prices in the Western Utilities' contracts were substantially higher than the Commission's $74 per MWh benchmark just-and-reasonable price – sometimes, *multiples* of that price. For example, some Nevada Power contracts with Enron set a price of $290 per MWh. GSWC's cost of baseload energy for its ratepayers more than doubled – from $35.50 per MWh to $95.00 per MWh – under the five-year contract it entered. Pet. App. 28a-29a.

These contracts placed enormous burdens on consumers. For example, by March of 2002 Snohomish had suffered a net loss of approximately $26 million under its contract with MSCG and projects it will lose more than $150 million over the life of the contract – losses which must be borne by its electric consumers. ER 837.[4]

---

[4] Relying on FERC's flawed factual findings, Morgan Stanley Capital Group Inc. (MSCG) claims (Pet. 5) Snohomish made a profit over the first five months of 2001 by reselling power from MSCG's contract at inflated prices. But MSCG did not begin delivering power to Snohomish until April 1, 2001, and FERC intervened to correct market prices in June 2001, after which prices were generally well below the $105 per MWh rate in the MSCG contract. Therefore, Snohomish could have profited only for the first two or three months of the 108-month contract.

3. The Decisions Below

The Western Utilities filed complaints at FERC pursuant to Section 206 of the FPA, arguing that because the market was dysfunctional when these contracts were formed, and the contract rates substantially exceeded FERC's benchmark price, FERC should prospectively reform the contract rates to just and reasonable levels. The Nevada Attorney General's Bureau of Consumer Protection (BCP) intervened to fulfill its mandate to represent the interests of Nevada utility consumers. After setting for hearing the issue of whether the dysfunctional California spot markets adversely affected prices in long-term bilateral contracts (Pet App. 269a, 317a (citing order)), FERC denied the complaints without reaching that issue or determining whether the Western Utilities' contracts were unjust and unreasonable. Pet. App. 292a-293a.

FERC ultimately concluded that whether the contract rates were just and reasonable was irrelevant. In FERC's view, "a finding that the unjust and unreasonable spot market prices caused forward bilateral prices to be unjust and unreasonable would be relevant to contract modification only where there is a 'just and reasonable' standard of review." *Id.* at 292a. Here, FERC held that the just and reasonable standard of review was not available to the Western Utilities since FERC had "pre-determine[d]" that the rates were just and reasonable – in some cases years earlier – when it granted Enron and the other sellers blanket authority to sell electricity at market-based rates. *Id.* at 322a-23a, 325a. Pointing to this Court's decisions in *Mobile* and *Sierra*, FERC maintained that the rates included in a contract executed pursuant to such blanket market-based rate authority were subject only to the "public interest" standard, which FERC viewed as entirely separate from the "just and reasonable"

standard. FERC evaluated the contract rates under the "Sierra Three-Prong Test," *id.* at 293a – the three factors mentioned in *Sierra* as bearing on whether contracts rates were *too low*. FERC also purported to apply what it characterized as a "[t]otality of [c]ircumstances" analysis, which, notwithstanding the expansiveness of its title, focused primarily on the purchasing practices of the Western Utilities without considering the broader dysfunction of the markets in which the purchases were made. *Id.* at 296a. Concluding that the Western Utilities had not justified relief under its conception of the public interest standard, FERC denied relief.

The Ninth Circuit, recognizing that it was the first court to address the application of the *Mobile-Sierra* doctrine to FERC's more recent market-based rate regime, *id.* at 9a-10a, held that FERC had committed several errors in invoking *Mobile-Sierra* to reject the complaints.[5] First, agreeing with FERC's own view that "an opportunity for initial review of whether a rate is just and reasonable is necessary for *Mobile-Sierra* to apply," *id.* at 39a, the court concluded that FERC had not provided such an opportunity in the regulatory system for market-based rates that it had in place at the time. FERC's *ex ante* review of sellers' market power was not alone adequate, the court held, but must include sufficient monitoring and oversight "to ensure that the resulting rates were within the statutory 'just and reasonable' range in the first instance." *Id.* at 51a; *see id.* at 46a-57a. Here, despite promising to oversee long-term contracts and adopting a benchmark price,

---

[5] The same Ninth Circuit panel issued two decisions the same day. The first (Pet. App. 1a-67a) resolved challenges brought by the Western Utilities. The second (Pet. App. 364a-80a) resolved challenges brought by the California Public Utilities Commission and the California Electric Oversight Board.

"FERC failed to adopt *any* monitoring mechanism before applying deferential *Mobile-Sierra* review to the challenged contracts." *Id.* at 50a (emphasis added).

Second, the court held that FERC had unduly restricted the substantive scope of the review necessary before the *Mobile-Sierra* presumption applies. In particular, the review must "focus on whether the original negotiations occurred in a functional marketplace such that we may presume the contracted rates were originally just and reasonable." Pet. App. 42a, 57a, 60a. Here, a detailed analysis by FERC's own staff made well-supported findings that gross malfunctions in the spot market corrupted prices in the forward market (*id.* at 58a), yet FERC deemed such facts "irrelevant" when invoking the *Mobile-Sierra* presumption. *Id.* But "the questions raised by the Staff Report – whether and how the manipulated spot market influenced the forward markets – *are* relevant to determining whether the *Mobile-Sierra* doctrine applies, because they raise questions about the market conditions at the time of contract formation and thus about the propriety of relying on a regime of market-based rate authority at that time to produce just and reasonable rates." *Id.* at 60a. FERC committed "fundamental error" in treating "the market-function evidence as irrelevant to the question *whether Mobile-Sierra* applies." *Id.* at 60a (emphasis in original).

In addition to these errors in determining whether *Mobile-Sierra* applied, the court held that FERC also had improperly defined the content of the *Mobile-Sierra* "public interest standard" if and when it does apply in a challenge alleging rates are too high. The court observed that "FERC determined that the challenged contract rates did not impact the public interest principally because the [Western Utilities] presented little evidence relevant to the three public

interest factors specifically mentioned in *Sierra*." *Id.* at 61a-62a (footnote omitted). The Ninth Circuit concluded that FERC had incorrectly assumed "that *Sierra* established a three-prong public interest standard applicable across all circumstances." *Id.* at 62a. But, the court explained, the factors applicable to a low-rate challenge are not necessarily the same as the factors applicable to a high-rate challenge. *Id.* at 61a-64a. The court thus held "that FERC did not properly assess the public interest of any of the contracts before it in this case." *Id.* at 65a.

The court of appeals remanded the case involving the Western Utilities to FERC to reconsider the complaints. *Id.* at 4a. It did the same in the companion case. *Id.* at 367a.

ARGUMENT

The Ninth Circuit's decisions are correct under the FPA and consistent with this Court's decisions, including *Mobile* and *Sierra*. The decisions – the first to apply *Mobile-Sierra* to FERC's market-based rate regime – do not conflict with decisions of any other circuit. In addition, as confirmed by FERC's determination not to seek review by this Court, the decisions leave ample discretion for FERC to preserve its commitment to market-based rates while intervening in true episodes of market dysfunction like the 2000-2001 western energy crisis. Those facts, plus the interlocutory posture of these cases and the significant changes FERC already has made in the regulatory regime that gave rise to these cases, make review inappropriate.

I. The Decisions Below Are Consistent With The Statute And This Court's Decisions.

A. The Statute

The FPA requires unambiguously that "*[a]ll* rates and charges made, demanded, or received" for

wholesale electric services "*shall* be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be *unlawful*." 16 U.S.C. § 824d(a) (emphasis added). The "just and reasonable" requirement lies at the "heart" of the Act's regulatory system. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944). The Ninth Circuit's rulings embody a logical application of the categorical command "that *all* rates be 'just and reasonable.'" Pet. App. 35a.

The Ninth Circuit sensibly reasoned that a rate in a contract cannot be presumed just and reasonable where the market giving rise to the contract does not produce competition sufficient to drive rates to just and reasonable levels and FERC has no effective means to monitor the rates. It further sensibly recognized that the circumstances that can make a presumption of lawfulness unjustified are not limited to the market power or transaction-specific misconduct of a particular seller. They also include structural problems in the market and the market-wide consequences of the misconduct or abuse of market power by other sellers – such as those at work in 2000-2001 in the western United States.

In determining when the *Mobile-Sierra* presumption applies, the Ninth Circuit drew a logical statutory conclusion: where the market was not functioning properly at the time of contract formation, and there was no adequate opportunity for regulatory review of rates set in the marketplace, there is no basis to presume that market-based contract rates are necessarily just and reasonable. As to what *Mobile-Sierra* means when it applies, the Ninth Circuit drew similarly straightforward conclusions: that the statute requires all wholesale rates to be "just and reasonable," and that, particularly given the statutory purpose of

protecting consumers, the factors that may make a contract rate too low are not necessarily the same as the factors that may make a contract rate too high. These are the minimal logical implications of the statute.

B. *Mobile* and *Sierra*

This Court's decisions in *Mobile* and *Sierra* were decided decades before the advent of a "market-based" rate regime (where review of sellers substitutes for review of rates). In those cases, the Court rejected the attempt of regulated sellers to unilaterally raise contract rates they had filed with the Commission where those rates had been subject to Commission review, subject to protest, and in effect for years without any question about the circumstances existing at contract formation. The Ninth Circuit's decisions are fully in accord with *Mobile* and *Sierra*.

In *Sierra*, in order to "forestall the potential competition" created by the Shasta Dam's unused generating capacity, the seller contractually agreed to sell power "at a special low rate." 350 U.S. at 352. Then, once power from the dam was no longer available, the seller unilaterally filed a tariff purporting to increase the contract rate by 28%. *Id.* Similarly, in *Mobile*, the pipeline seller agreed to provide gas under a long-term contract at a special low rate to a local distribution company, which in turn agreed to resell the gas under a long-term contract to an industrial facility as an inducement to locate in the city. Then, after these arrangements were in place and sales had begun, the pipeline unilaterally filed a tariff seeking to substantially increase the contract rate. *Mobile*, 350 U.S. at 335. The contracts the sellers sought to abrogate had been filed with the Commission with public notice and an opportunity for review of the contract rates, and there was no indication of

dysfunction in the market at contract formation. In these circumstances, this Court held that the Act did not authorize the sellers' abrogation of the pre-existing rates to obtain higher rates unless the pre-existing rates were contrary to the "public" interest, not merely the sellers' private interest. *Mobile*, 350 U.S. at 339, 344; *Sierra*, 350 U.S. at 355.

Although petitioners at times seem to suggest otherwise, this Court in *Mobile* and *Sierra* nowhere said that rates are immune from the statutory command that rates be just and reasonable just because they were adopted in contracts.[6] Nor did this Court hold all contracts immune from regulatory review, regardless of the circumstances. To the contrary, the Court emphasized that, while rates may be "established initially by contract," all contracts must be filed with the Commission to allow for their "supervision" by the Commission for "the protection of the public interest," *Mobile*, 350 U.S. at 339; that "all rates are subject to being modified by the Commission upon a finding that they are unlawful," *id.* at 341; and that its holding "in no way impairs the regulatory powers of the Commission to . . . modify [contracts] when necessary in the public interest," *id.* at 344. For its part, the Ninth Circuit here expressly recognized the "stability of contract considerations that underlie the *Mobile-Sierra* doctrine" and did no more than

---

[6] Petitioners Calpine, Allegheny, and MSCG, respondent Mirant, and others recognized this point when they promptly sought clarification or rehearing of FERC's order below, fearing that it "could be construed as suggesting incorrectly that the *Mobile-Sierra* doctrine sanctions unjust and unreasonable rates." ER 356B. They insisted that the doctrine merely addresses what the statutory just-and-reasonable standard means in certain contract situations. *Id.* at 356B-356G.

require compliance with the basic statutory command, logically applied. Pet. App. 63a.

More particularly, the Court in *Mobile* and *Sierra* did not rule, and could not have ruled, that a contract rate may be presumed just and reasonable so as not to injure the public even where the contract has never been filed with an opportunity for review in the Commission or the contract was formed in a dysfunctional market. Neither circumstance existed in *Mobile* and *Sierra*. The contracts had been filed with the Commission, affording it an opportunity to review them before allowing them to take effect. *Id.* at 39a.[7] And there was no issue about the circumstances existing at contract formation in *Mobile* and *Sierra*, while market dysfunction resulting from the western energy crisis is the central problem in the present cases. Thus, the Ninth Circuit's ruling that FERC must "have an opportunity for some initial review of rates" and "the scope of that review must permit consideration of the factors relevant to the propriety of the contract's formation" before the presumption of legality is triggered, *id.* at 41a, does not conflict with *Mobile* and *Sierra* (emphasis omitted).

Similarly, nothing in the Ninth Circuit's decision about when rates might be *too high* (even where the presumption of *Mobile* and *Sierra* applies) conflicts with *Sierra*'s discussion of circumstances that might justify contract abrogation when a *seller* seeks to increase rates that are allegedly *too low*. *Sierra*'s discussion is by its very terms not exhaustive even as to the low-rate situation, and its essential point is that

---

[7] Dynegy emphasizes (Pet. 21-22) that, unlike the other contracts, its contract actually was filed with FERC. However, while the contract was filed, it was not subject to review and not subject to challenge. *See GWF Energy, LLC*, 97 FERC ¶ 61,297at 62,391 (2001).

a contract rate cannot be unreasonable to consumers "solely because it yields less than a fair return on the net invested capital." *Sierra*, 350 U.S. at 355. The *Sierra* discussion does not speak at all to the factors that apply when a contract rate might be *too high*. Even petitioner Sempra (Pet. 7) appears to recognize "that *Sierra* only 'gave examples of factors that would meet the 'public interest' standard." Contrary to Dynegy's complaint about "asymmetric standards" (Dynegy Pet. 25), the too-high/too-low distinction is hardly an unnatural one in a statute whose essence is to protect *consumers*. *See Pennsylvania Water*, 343 U.S. at 418.

In short, only by misreading *Mobile* and *Sierra*, and disregarding the sharp differences in the relevant regulatory and market circumstances, can petitioners posit an incompatibility with the Ninth Circuit's rulings. The decisions are fully in accord.

C. Other Decisions Of This Court

The Ninth Circuit's conclusions are consistent not only with *Mobile* and *Sierra*, but also with every other relevant decision of this Court construing the FPA or NGA. Petitioners' views, in contrast, contradict such decisions at every turn.

The Ninth Circuit's conclusion that FERC must have an opportunity to consider the factors relevant to a contract's formation (Pet. App. 41a), unlike petitioners' view, reflects this Court's conclusion that FERC must have "an opportunity *in every case* to judge the reasonableness of the rate" in a contract. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981).[8]

---

[8] MSCG contends that its contract with Snohomish contained a specific provision, Section 39B, barring changes in rates. MSCG Pet. 5. MSCG misreads the provision, as did FERC. Properly read, Section 39B permits Snohomish to challenge the *length* of its agreement, and that is what Snohomish actually

The Ninth Circuit's insistence on co-existence of contract stability with FERC regulation, unlike petitioners' view, accords with this Court's explanation that "there were *two* sources of price and supply stability inherent in the regulatory system established by [the FPA] – the provisions of private contracts *and* the public regulatory power." *Sunray Mid-Continent Oil Co. V. FPC*, 364 U.S. 137, 155-56 (1960) (emphases added). The Ninth Circuit's statutory rulings, unlike petitioners' views, also respect this Court's recognition of "the purposes for which the [FPA] was adopted" (*NAACP v. FPC*, 425 U.S. 662, 669-70 (1976)) – "to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). *Cf. Atlantic Refining Co. v. Pub. Serv. Comm'n of New York*, 360 U.S. 378, 388 (1959) (NGA "afford[s] consumers a complete, permanent and effective bond of protection from excessive rates and charges"); *Hope*, 320 U.S. at 610 (the "primary aim" of the NGA "was to protect consumers against exploitation at the hands of natural gas companies").

Although petitioners suggest that this Court has all but forbidden Commission contract reformation, this Court has concluded that the *Mobile-Sierra* doctrine preserves FERC's "plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests," *Permian Basin*, 390 U.S. at 784, and "does not affect the supremacy of the Act itself," *Arkansas Louisiana*, 453 U.S. at 582. Hence, in

---

challenges. The Ninth Circuit did not need to reach the Section 39B issue. Pet. App. 42a n.22. Even if its decision were to be overturned, the result with respect to Snohomish would not change under a proper reading of Section 39B.

Permian Basin, this Court *upheld* the FPC's *abrogation of contract terms* that were inconsistent with both the price ceiling and price floor established in natural gas "area rate" proceedings – as well as its refusal to abrogate some existing contract prices below the maximum area rates. 390 U.S. at 783-84, 818-22. *Accord FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 646-47 (1972) (upholding FERC orders amending contracts in light of natural gas market dysfunction).

In *Texaco*, the Court held that "the Commission lacks the authority to place exclusive reliance on market prices." 417 U.S. at 400. Petitioners' contention that FERC must uphold contracts even when market dysfunction or anti-competitive conduct drives rates to unreasonably high levels is not consistent with *Texaco* or this Court's other decisions. In contrast, the Ninth Circuit's conclusion that FERC must ensure that market-based contracts are "initially formed free from the influence of improper factors, such as market manipulation, the leverage of market power, or an otherwise dysfunctional market," Pet. App. 57a, is fully consistent with this Court's jurisprudence.

II. The Ninth Circuit's Decisions Do Not Conflict With Other Circuits' Law.

The Ninth Circuit decisions create no intercircuit conflict. As the Ninth Circuit correctly recognized, its decisions are the first to address application of the *Mobile-Sierra* doctrine to rates adopted under the Commission's market-based regime (which FERC has since modified to provide better oversight). Pet. App. 9a-10a. The cases addressing *Mobile-Sierra* cited by petitioners – with one exception, all from the D.C. Circuit or the First Circuit – arise entirely from traditional cost-based rate-filing regimes.[9] In addition,

---

[9] MSCG (Pet. 18) claims that *Boston Edison Co. v. FERC*, 233

whereas the Ninth Circuit cases address challenges by buyers to contract rates that are alleged to be too high, most earlier cases addressed sellers' challenges to contract rates alleged to be too low. As the First Circuit noted, "[v]ery little useful precedent exists" addressing "high-rate" cases. *Boston Edison*, 233 F.3d at 68. The Ninth Circuit carefully addressed other circuits' decisions and reached conclusions in harmony with them, as well as with the statute and this Court's precedents.

A. The D.C. Circuit

The Ninth Circuit's focus on the need for an opportunity for effective review of rates is fully consistent with the D.C. Circuit's decisions upholding FERC's use of market-based rates – decisions that themselves rely on FERC's assurances that it would interpose regulatory remedies when market flaws threaten to produce rates outside the "zone of reasonableness." *Interstate Natural Gas Assoc. v. FERC*, 285 F.3d 18, 30-31 (D.C. Cir. 2002); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) ("FERC has made it clear that it will exercise its § 5 authority (upon its own motion or upon that of a complainant) to assure that a market (*i.e.*, negotiated) rate is just and reasonable."); *Louisiana*

F.3d 60 (1st Cir. 2000), and *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) ("*TAPS*"), *aff'd, New York v. FERC*, 535 U.S. 1 (2002), concerned "contracts entered into under the modern regulatory regime." But *Boston Edison* involved traditional rate-of-return contracts for output from a nuclear plant that were filed with the FPC in 1972 and amended in 1985. 233 F.3d at 61-63. In *TAPS* the D.C. Circuit approved FERC's policy allowing customers to *modify* unjust and unreasonable wholesale electricity requirements contracts that "were entered into during an era in which transmission providers exercised monopoly control over access to their transmission facilities." 225 F.3d at 712 (citation omitted).

Energy & Power Auth. v. FERC, 141 F.3d 364, 369-71 (D.C. Cir. 1998) (pointing to the "escape hatch" or "safeguard" of further Commission review should markets fail). Indeed, the D.C. Circuit has made clear that relying on market forces *alone* "does not comport with FERC's statutory responsibilities" where "nothing in the regulatory scheme itself acts as a monitor" to ensure that rates stay within the "zone of reasonableness." *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1501-09 (D.C. Cir. 1984). The Ninth Circuit's central conclusion that FERC failed to provide any effective oversight mechanism is fully consistent with these D.C. Circuit cases.

The Ninth Circuit's decisions are also consistent with D.C. Circuit cases construing the *Mobile-Sierra* doctrine. As the D.C. Circuit recently noted, before 2006 it "only had occasion to apply the *Mobile-Sierra* public interest standard to FERC-*approved* contracts rather than those submitted to FERC for initial approval." *Maine Pub. Serv. Comm'n v. FERC*, 454 F.3d 278, 283 (D.C. Cir. 2006) (emphasis added). When confronted for the first time with an initial review case, the D.C. Circuit, like the Ninth Circuit, concluded that the terms of a contract limiting FERC review can be given effect only after FERC has had an opportunity for review of the contract, rejecting the proposition that "parties may, by mutual agreement, limit FERC's authority under Section 205 over initial review of a rate." *Id.* at 285-86.

The D.C. Circuit has limited the reach of language it has recognized as potentially overbroad in some older cases relied upon by petitioners. For example, in *PEPCO v. FERC*, commenting on earlier language (in a case involving an already-*reviewed* contract) that the presumption of legality of a contract rate is "practically insurmountable," the D.C. Circuit explicitly adopted

FERC's reasoning that to "apply[] the 'practically insurmountable' standard in *first review* cases would mean that FERC's ability to protect the public interest would be negligible and public regulation would consist of little more than rubber-stamping private contracts." 210 F.3d 403, 409 (D.C. Cir. 2000) (emphasis added). The D.C. Circuit has likewise made clear a crucial premise of *Mobile-Sierra*: "As we have held, the purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties' bargain as reflected in the contract, *assuming there was no reason to question what transpired at the contract formation stage.*" *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) (emphasis added); *accord*, *Town of Norwood v. FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978) ("*when there is no reason to question what occurred at the contract formation stage*, the parties may be required to live with their bargains") (emphasis added). D.C. Circuit law thus shares the central tenets of the Ninth Circuit's rulings here.

In the important *TAPS* decision, the D.C. Circuit relied on these principles to *approve FERC's determination to allow customers to modify certain wholesale electricity contracts* that were tainted by market power because it would be contrary to the "public interest" to "let all contracts run their course with no opportunity for customers to modify or terminate their contracts, no matter how long the contracts or how onerous their terms." Order No. 888-A, 62 Fed. Reg. 12,274, 12,285 (March 14, 1997), *aff'd*, *TAPS*, 225 F.3d at 712. The D.C. Circuit likewise approved FERC's reformation of contracts affected by market dysfunctions in the natural gas industry. *United Distributors Cos. v. FERC*, 88 F.3d 1105, 1131 (D.C. Cir. 1996).

As to what *Mobile-Sierra* means when it applies, the D.C. Circuit has never insisted that the *Sierra* low-rate factors exhaust the inquiry in high-rate cases. The D.C. Circuit has spoken, more broadly, of the demand for "supportable and reasonable explanations for how the public interest required modification of private contracts." *Texaco Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Circuit 1998). Despite petitioners' claims (MSCG Pet. 24, Dynegy Pet. 22), *PEPCO* is not to the contrary. The court there concluded that the petitioner "fail[ed] to provide any evidence of undue discrimination or excessive burden" and provided nothing more than "mere speculation" that electric consumers would be harmed by the FERC-approved contract at issue. 210 F.3d at 409. The record here, by contrast, contains vast evidence of market power, market dysfunction, violation of market rules, and direct impacts on electric consumers. Nothing in the D.C. Circuit's decision in *PEPCO*, or elsewhere, conflicts with the Ninth Circuit's ruling that FERC must now consider that evidence.

Nor is there merit to petitioners' claim (Dynegy Pet. 25) that the D.C. Circuit's decision in *Pub. Serv. Comm'n of New York v. FPC*, 543 F.2d 757 (D.C. Cir. 1974), conflicts with the Ninth Circuit's application of the just and reasonable standard. There the D.C. Circuit actually *approved* the FPC's abrogation of the contractual rate of 23.9 cents per thousand cubic feet of gas, in favor of the lower 18.5 cent rate FPC had earlier approved as just and reasonable in "area rate" proceedings. In *reducing* the rate, the D.C. Circuit "perceive[d] no impingement upon the *Mobile-Sierra* doctrine." *Id.* at 795. At the same time, the D.C. Circuit rejected, on *Mobile-Sierra* grounds, the FPC's attempt to eliminate the $134 million contractual cap on the pipeline's payments to the regulated producers and to replace it with a payment formula that would

have substantially *increased* payments to the producers. *Id.* at 795-96. The D.C. Circuit's statement that FERC is "no more at liberty to alter" contracts "to the prejudice of the producers than to do so in their favor" was made in the context of a contract between natural gas producers and pipelines, with no clear implication for ultimate gas consumers. *Id.* at 798.

Petitioners also claim (Calpine Pet. 12; Dynegy Pet. 16; Sempra Pet. 16-17) that the Ninth Circuit's decisions are inconsistent with *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1112-14 (D.C. Cir. 1974), and related D.C. Circuit cases.[10] But those cases addressed whether a seller can unilaterally force a buyer to accept a new, higher-rate contract when the seller failed to comply with its obligations to file the original contract. The Ninth Circuit correctly concluded that "*Lansdale's* position that a seller may not profit by failing properly to file a rate-setting contract it freely entered into is hardly remarkable, but is also not particularly pertinent to the questions at issue here." Pet. App. 40a.[11]

B. The First Circuit

The Ninth Circuit's construction of *Mobile-Sierra* does not conflict with First Circuit decisions. Petitioners claim (Dynegy Pet. 24) that *Boston Edison Co.* requires application of the "public interest"

---

[10] *Compania de Gas de Nuevo Laredo v. FERC*, 606 F.2d 1024, 1028-30 (D.C. Cir. 1979); *Sam Rayburn Dam Elec. Coop. v. FPC*, 515 F.2d 998, 1008-10 (D.C. Cir. 1975).

[11] Petitioners (Dynegy Pet. 16) cite only one case outside the First and D.C. Circuits to support their claims of circuit conflicts – a case decided fifty years ago in the Fifth Circuit, *Natural Gas Pipeline Co. v. Harrington*, 246 F.2d 915, 919 (5th Cir. 1957). But that case addressed the same issue as the D.C. Circuit's *Lansdale* decision and is irrelevant for the same reasons.

standard in this case. But unlike the contracts at issue here, the contracts reviewed in *Boston Edison* had already been accepted for filing by FERC (233 F.3d at 69) – as also was true in *Boston Edison Co. v. FERC*, 856 F.2d 361, 371-72 (1st Cir. 1988). FERC had the opportunity to determine whether the contracts were just and reasonable in the first instance, which it did not have here.

Petitioners also claim (MSCG Pet. 24) that the First Circuit requires contracts to be analyzed under the *Mobile-Sierra* factors developed for "low-rate" cases even where the Commission is considering a challenge to a contract rate that is too high. In fact, the First Circuit, upholding FERC's most thorough explication of the *Mobile-Sierra* doctrine to date, has held exactly the opposite:

> The holding of *Sierra* is clear; what justifies protective action in the public interest by the Commission *when it is considering whether a contract rate is too low* is whether the rate might impair the financial ability of the utility to continue to supply electricity, force electricity consumers to bear an excessive burden, or be unduly discriminatory. This definition of what is necessary in the public interest was formulated in the context of a *low-rate case*. It was not and could not be an across-the-board definition of what constitutes the public interest in other types of cases.

Northeast Utils. v. FERC, 55 F.3d 686, 690 (1st Cir. 1995) (emphasis added), *aff'ing Northeast Utils. Serv. Co.*, 66 FERC ¶ 61,332, p. 62,081-88 (1994).

Petitioners also rely (Dynegy Pet. 19-20) on *dictum* from *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993), suggesting that a "case-by-case" analysis of market power in the context of *Mobile-*

Sierra might unnecessarily inject a "time-consuming element" into FERC's "public interest" review, requiring a "fuller explanation from the Commission . . . before proceeding down this route." *Id.* at 961. But nothing in the Ninth Circuit's decisions requires a "case-by-case" analysis of market power or dysfunction, Pet. App. 11a (FERC "must find *another method* of evaluating whether the challenged rates are just and reasonable" besides simple abdication of its statutory duty (emphasis added)), and FERC has already rejected the assertion that it does. *Californians for Renewable Energy, Inc. v. California PUC*, 119 FERC ¶ 61,058, ¶ 1 (2007) ("*CARE*").

Petitioners also claim (Dynegy Pet. 25-26) that the Ninth Circuit's decisions conflict with the First Circuit's suggestion in *Northeast Utilities* that FERC cannot apply a "just and reasonable" analysis to alter a contract containing *Mobile-Sierra* language. *Northeast Utils.*, 993 F.2d at 961. There is no conflict. Petitioners' point is only about a difference in terminology – the First Circuit suggested that "public interest" *displaces* the statutory "just and reasonable" requirement, a position petitioners have rightly disowned, *see* note 6, *supra* – and not of substance: the circuits' ruling on this issue do not conflict over the substantive standards applicable to contracts covered by *Mobile* and *Sierra*.

The Ninth Circuit reasoned (Pet. App. 63a-65a) that the "public interest" protected by the FPA is implicated when electric consumers suffer from artificially inflated rates due to wholesale electric contract rates driven *above* the "zone of reasonableness" by market dysfunction, and that FERC's "excessive burden" test was contrary to the statute because it failed even to consider that harm. Expressly recognizing that FERC must weigh the public interest in the stability of

contracts, the Ninth Circuit did not equate Commission authority over contract rates subject to *Mobile-Sierra* with Commission authority over rates that are not part of a contract subject to *Mobile-Sierra*. For its part, the First Circuit recognized that "[t]he *Mobile-Sierra* doctrine itself allows for intervention by FERC where it is shown that the interests of third parties are threatened . . . *notably the buyer's customers*." *Northeast Utils.*, 993 F.2d at 961 (emphasis added). And it subsequently approved FERC's rejection of a contract clause that *potentially* threatened electric consumers with open-ended rate increases. *Northeast Utils.*, 55 F.3d at 691-93. The Ninth Circuit's conclusion that large *actual* rate increases arising from documented market dysfunction may violate the public interest is therefore fully consistent with First Circuit precedent.

III. The Decisions Below Give FERC Ample Authority To Rely On Market-Based Rates.

Petitioners predict doom for FERC's market-based rate reforms and for investment in the industry. But nothing in the Ninth Circuit's decisions will cause the hypothesized harms. Indeed, the FERC program that the Ninth Circuit found faulty has already been modified by FERC in significant ways it deems to improve protection of consumers and to strengthen investment.

To begin with, nothing in the Ninth Circuit's opinions challenges FERC's authority to rely on market-based rates. Indeed, although neither the Western Utilities nor the Nevada BCP raised any such challenge, the Ninth Circuit explicitly concluded that FERC *may* rely on market-based rates so long as it maintains safeguards to ensure that the markets function properly. Pet. App. 47a.

Nor is there any basis for petitioners' argument that the Ninth Circuit's decisions allow buyers to escape contracts simply because they become dissatisfied with their bargain.[12] To the contrary, the Ninth Circuit explicitly rejected the proposition that "*any* direct impact on consumer rates is enough" to justify contract reformation and recognized that "normal market forces" may cause brief spikes in rates. Pet. App. 64a (emphasis in original). Accordingly, the Ninth Circuit's decisions do not open energy contracts to generalized attack. In fact, FERC has itself recently concluded that the Ninth Circuit did nothing to invalidate the Commission's market-based rate program. *CARE*, 119 FERC at ¶¶ 1, 45. Nor do the decisions undermine proper investment incentives, since sellers may retain profits that would be produced in properly functioning markets. The Ninth Circuit has merely required FERC to have an effective mechanism in place for situations, like the 2000-2001 western energy crisis, when markets fail to maintain rates at just and reasonable levels.

In fact, the record contains substantial evidence that investment is strongest in well-regulated markets, and that the radical form of deregulation advocated by petitioners would actually harm investment, as well as overall economic performance. Evidence submitted by the Western Utilities demonstrates, for example, that reform of the contracts arising from dysfunctional markets is necessary to ensure the proper functioning of those markets, ER 1028-29, 1082-84; to prevent a

---

[12] In advancing this claim, MSCG (Pet. 8) relies on FERC counsel's arguments concerning "sanctity of contracts" and the ALJ's erroneous claim that the MSCG contract somehow "resulted in rate relief" for Snohomish's ratepayers. Neither claim was ever made by the Commission, however, and therefore its decision cannot be upheld on those bases.

perverse and wasteful roller-coaster pattern of investment in the industry, ER 892, 1050-51, 1084; to avoid "merely perpetuat[ing]" the economic dislocation caused by the market dysfunction, which resulted in "the loss of tens of thousands of jobs and huge losses in productivity across the region," ER 1051; and to prevent the collapse of FERC's primary policy goal, market-based reform in the electric industry, ER 1084-86. Indeed, ten of the nation's leading academic economists – including Dr. Alfred Kahn, the intellectual pioneer of the deregulation movement – advised FERC in the midst of the crisis that "temporary market interventions" were needed to ensure just and reasonable rates and warned that FERC's failure to act could "setback, potentially fatally, the diffusion of competitive electricity markets across the country." ER 896-98.

Petitioners cite but two examples to support their prediction of a flood of litigation challenging market-based contracts. FERC disposed of the first, *CARE*, by summary dismissal. The second is a recently filed complaint by the Illinois Attorney General alleging that suppliers bidding into the auction used by Illinois to provide power for the bulk of its retail consumers engaged in market manipulation and manipulation of the auction process, resulting in rates far outside the zone of reasonableness. *See* Amended Complaint, *Madigan v. Exelon Generation Co. et al.*, FERC Docket No. EL07-47-000 (filed March 15, 2007). FERC has yet to take any action on this complaint, but petitioners' claim that FERC is without authority to address such serious allegations of wrongdoing only underscores that the Ninth Circuit was correct in rejecting their position. And these two complaints hardly constitute the flood of litigation predicted by petitioners.

Those predictions are further discredited by the substantial changes to the regulatory system that have occurred in the years since the western crisis ended in 2001, which were implemented to "prevent a repeat of the California 2000-2001 energy crisis." *CARE*, 119 FERC at ¶ 31. As FERC has concluded, the relevant regulatory regime has "undergone substantial improvements since 2001." *Id.* at ¶ 29. *Accord* Order No. 697, *Market-Based Rates*, 72 Fed. Reg. 35,903, 39,906-07 (July 20, 2007). Specifically, Congress in 2005 added significant new regulatory tools to FERC's arsenal designed to prevent a recurrence of the market manipulation that characterized the 2000-2001 crisis. *CARE*, 119 FERC at ¶¶ 33-35 (describing changes to FPA and FERC rulemakings to implement those changes). In addition, FERC itself has substantially strengthened the lax market oversight that contributed greatly to the 2000-2001 crisis.[13]

For example, FERC has both tightened its requirements for granting market-based rate authority to sellers and improved monitoring of conduct and policing of violations. *Id.* at ¶¶ 31-32, 35-39 (describing FERC reform measures). Recently (June 21, 2007), FERC adopted final rules "clarifying and further improving its market-based rate program." Order No. 697, 119 FERC ¶ 61,295 (2007). FERC's Chairman noted that FERC's current market-based rates program "bears little resemblance to the program the [Ninth Circuit] criticized." Statement of Chairman Kelliher, *available at* http://www.ferc.gov/news/statements-speeches/kelliher/2007/06-21-07-kelliher-E-1.pdf. FERC has also initiated a rulemaking to further

---

[13] California also has implemented extensive changes to its electric markets designed to prevent a repeat of the 2000-2001 crisis. *Id.* at ¶ 31 & n.27 (describing FERC approval of extensive changes to California's market design).

improve the operation of "organized" markets such as those in California. *Wholesale Competition*, 72 Fed. Reg. 36,275 (July 2, 2007). This Court should not review decisions about a regulatory program that already has changed considerably, particularly when FERC itself views the changes as improvements.

Finally, these cases are in an interlocutory posture, and petitioners may present their policy arguments to FERC on remand. It is at a minimum premature to conclude that FERC cannot avoid untoward consequences of the sort petitioners allege will flow from the Ninth Circuit's decisions.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

RICHARD TARANTO
FARR & TARANTO
1220 19th Street N.W., Ste. 800
Washington, DC 20036

ROGER BERLINER
BERLINER LAW PLLC
700 12th Street, N.W., Ste. 700
Washington, DC 20005
Counsel for Nevada Power Company and Sierra Pacific Power Company

CHRISTOPHER J. WRIGHT*
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300
Counsel for Snohomish County PUD No. 1

* *COUNSEL OF RECORD*

PAUL J. KALETA
NEVADA POWER COMPANY
6226 West Sahara Avenue
Las Vegas, NV 89151

ERIC CHRISTENSEN
SNOHOMISH COUNTY PUD NO. 1
2320 California Street
Everett, WA 98201

JOHN E. MCCAFFREY
DAVID D'ALESSANDRO
KELLY A. DALY
STINSON MORRISON HECKER LLP
1150 18th Street, N.W., Ste. 800
Washington, DC 20036-3816
Counsel for the Office of the Nevada Attorney General Bureau of Consumer Protection

RANDOLPH LEE ELLIOTT
MILTON J. GROSSMAN
JEFFREY K. JANICKE
MILLER, BALIS & O'NEIL, P.C.
1140 19th St., N.W., Ste. 700
Washington, DC 20036
Counsel for Golden State Water Company

ERIC P. WITKOSKI
OFFICE OF THE NEVADA ATTORNEY GENERAL
BUREAU OF CONSUMER PROTECTION
555 E. Washington Ave. #3900
Las Vegas, NV 89101

August 6, 2007